

EXHIBIT 39

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF FLORIDA
3 PANAMA CITY DIVISION
4 Civil Case No. 5:19-cv-55-TKW-MJF

5 RESTORE ROBOTICS LLC and
6 RESTORE ROBOTICS REPAIR LLC,

7 Plaintiffs,

8 vs.

9 INTUITIVE SURGICAL, INC.,

10 Defendant.

11 INTUITIVE SURGICAL, INC.

12 Counterclaimant,

13 vs.

14 RESTORE ROBOTICS LLC and
15 RESTORE ROBOTICS REPAIR LLC,

16 Counterclaim Defendants.

17
18
19 REMOTE VIDEOTAPED DEPOSITION OF
20 TYLER McDONALD

21 Friday, May 21, 2021

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23
24
25 Court Reporter: Michelle M. Boudreaux-Phillips, RPR

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1 MR. BAILEY: Object to the form.

2 THE WITNESS: The service agreement
3 isn't handled directly by me, so I'd have to
4 defer to that person.

5 Q (By Mr. Berhold) Who handles it?

6 A Kyle Marks.

7 Q Does the da Vinci Si have instruments and
8 accessories?

9 A Yes.

10 Q Are you familiar with who are the suppliers
11 for new instruments for use with the da Vinci Si?

12 A Yes.

13 Q And who are the suppliers?

14 MR. BAILEY: Objection to form.

15 THE WITNESS: Intuitive.

16 Q (By Mr. Berhold) Anyone else, to your
17 knowledge?

18 A No.

19 Q Are there certain accessories that are also
20 only available from Intuitive Surgical?

21 A Yes.

22 Q Which ones?

23 A There are disposable accessories like drapes
24 that are used to cover the patients and the arms of
25 the -- of the robot during surgery.

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1 Q Are the instruments reusable?

2 A Yes.

3 Q Does Intuitive impose any limits on the use
4 of the instruments?

5 A Yes.

6 Q And is there any electrical or mechanical
7 device on the instrument that prevents any usage beyond
8 the limits prescribed by Intuitive?

9 A I'm not --

10 MR. BAILEY: Objection to form.

11 THE WITNESS: I'm not aware of the build
12 of the -- of the instruments.

13 Q (By Mr. Berhold) When an instrument reaches
14 the usage limit, does Conway have to purchase a new
15 one?

16 A Yes.

17 Q And why is that?

18 A The instrument no longer works with the
19 robot.

20 Q At some point, did Conway consider having a
21 third party refurbish its EndoWrist instruments?

22 A Yes.

23 Q Do you recall how that opportunity, the
24 opportunity to refurbish your instruments, came to the
25 attention of Conway?

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1 A Yes, I do recall.

2 Q And how did it come about?

3 A I believe I was -- I was informed by
4 Kyle Marks of the presence of a company that provided
5 that service.

6 Q So he talked to you about it?

7 A Yes.

8 Q And did you decide to do anything to
9 investigate the opportunity?

10 A We did.

11 Q What did y'all do?

12 A We brought the company in and performed a
13 trial of the refurbished instruments.

14 Q Before the trial, did you consult with the
15 surgeons at Conway?

16 A Yes.

17 Q And what was their take on the possibility of
18 using the refurbished instruments?

19 A They were --

20 MR. BAILEY: Objection to form.

21 Q (By Mr. Berhold) You can answer,
22 Mr. McDonald.

23 A Okay. They were -- they were eager to try
24 the instruments.

25 Q Could you walk through the -- what was done

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1 as part of the trial?

2 A We met with a small group of surgeons, I
3 believe two of which agreed to participate in trying
4 the refurbished instruments, and reported back to the
5 overall larger group their perception of the quality of
6 the instrumentation after using.

7 Q And who did they report to --

8 A Their --

9 Q -- regarding the results?

10 A Their colleagues, their partners.

11 Q And did anyone ever get back to you about
12 whether the trial was a success?

13 MR. BAILEY: Objection to form.

14 THE WITNESS: Yes.

15 Q (By Mr. Berhold) And who was that?

16 A The surgeons that participated in the trial
17 met with their partners and reported back to me that
18 they were collectively in agreement to move forward
19 with using the refurbished instruments.

20 Q And who did you specifically talk to?

21 A Dr. Andrew Cole was the primary.

22 MR. BERHOLD: Bailey, can we pull up
23 CONWAY-17, please.

24 (Discussion off the written record.)

25 Q (By Mr. Berhold) So, Mr. McDonald, an

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1 exhibit is going to come up on your screen in a minute.

2 Can you see Exhibit 1, Mr. McDonald?

3 A I can, yes.

4 Q Do you want to take a minute to review it?

5 A Yes, please.

6 Yeah, I've read through.

7 Q Do you recognize Exhibit 1?

8 A I do.

9 Q What is Exhibit 1?

10 A This is an email from the Intuitive
11 representative for our service area to me advising not
12 to move forward with the third-party company.

13 Q And this -- what is the date on the email?

14 A It says October 15th of 2018.

15 Q Do you recall whether this email arrived
16 during your trial of the reprocessed instruments --
17 excuse me, the refurbished instruments?

18 A I don't recall specifically.

19 Q Do you -- do you happen to know how
20 Mr. Brunen learned that Conway was looking at using
21 refurbished instruments?

22 A I do not know.

23 Q After the trial, did Conway start to
24 refurbish its instruments --

25 MR. BAILEY: Objection to form. I'm

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1 sorry, Jeff.

2 MR. BERHOLD: Let me ask it a different
3 way.

4 Q (By Mr. Berhold) So who -- do you recall who
5 was the -- who was going to be refurbishing the
6 instruments, who -- let me ask it even a different way.

7 Who -- do you recall who was refurbishing the
8 instruments in the trial for Conway?

9 A I don't recall specifically the vendors.

10 Q Do you recall at some point after the trial
11 that Conway started to -- started a program to
12 refurbish instruments with the third-party vendor?

13 MR. BAILEY: Objection to form.

14 Q (By Mr. Berhold) You can answer,
15 Mr. McDonald.

16 A Yes.

17 Q Did Conway observe any problems with the
18 quality of the refurbished instruments?

19 A No.

20 Q Did Conway observe any savings from the use
21 of refurbished instruments?

22 A Yes.

23 Q Would Conway still be refurbishing the
24 instruments today if it could do so?

25 A Yes.

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1 Q And why is Conway not refurbishing its
2 da Vinci Si instruments?

3 A We were no longer able to make purchases for
4 disposable equipment from Intuitive so long as we
5 continued to use these instruments.

6 Q And why would that be an issue for Conway
7 Regional?

8 A The disposable equipment is proprietary and
9 only available through Intuitive.

10 Q Was Intuitive withholding anything else
11 besides the disposables because you were refurbishing
12 the instruments?

13 MR. BAILEY: Objection to form.

14 THE WITNESS: Yes.

15 Q (By Mr. Berhold) What else?

16 A All of our instruments that we would purchase
17 through Intuitive were also withheld.

18 Q Was that a factor as well in why Conway
19 stopped refurbishing its instruments?

20 A Yes.

21 Q And why is that? And why is that,
22 Mr. McDonald?

23 A We were no longer able to procure the
24 instruments that were needed to move forward with our
25 da Vinci program and usage of the robot.

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1 Q And anything else that was being withheld by
2 Intuitive besides the disposables and the new
3 instruments --

4 MR. BAILEY: Objection to form.

5 Q -- because you were refurbishing the
6 instruments?

7 MR. BAILEY: Objection to form.

8 THE WITNESS: I'm not -- I'm not aware
9 of anything else.

10 Q (By Mr. Berhold) What about service, was
11 Intuitive still willing to provide service on the
12 da Vinci Si robot at Conway while you were refurbishing
13 instruments?

14 A No.

15 Q Was that also a factor in why Conway stopped
16 using refurbished instruments?

17 A Yes.

18 Q And why is that?

19 A Without ongoing service, the robot could
20 potentially become unusable.

21 Q So, Mr. McDonald, I just want to walk through
22 a series of emails in chronological order to just flesh
23 out things in a little more detail.

24 MR. BERHOLD: Bailey, can we pull up

25 CONWAY-18.

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1 (Discussion off the written record.)

2 Q (By Mr. Berhold) Mr. McDonald, do you need a
3 minute to review Exhibit 2?

4 A Please.

5 | Okay. Thank you.

6 Q Mr. McDonald, do you recognize Exhibit 2?

7 A I do.

8 MR. BERHOLD: Bailey, can we scroll back
9 up to the top of the exhibit.

10 Q (By Mr. Berhold) The first sentence says,
11 "You have informed us that you have been contacted by
12 Medical Device Innovations about providing you
13 reprogrammed instruments for your da Vinci system."

Do you know what he's referencing there?

15 A I don't.

16 Q Do you recall receiving this email?

17 A I do.

18 Q And did Conway stop refurbishing instruments
19 in response to this email?

20 A Eventually, yes.

21 Q But not immediately?

22 A Right.

23 Q Why not?

24 A We didn't immediately understand the language
25 and didn't feel that we were in violation of the

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1 of its own testing on the instruments?

2 A I don't -- I don't -- I'm not aware of any.

3 Q Did Conway ask for or look at any life
4 testing literature with respect to the instruments?

5 A I didn't specifically.

6 Q Do you know if anyone at Conway did?

7 A I don't know.

8 Q Did you ask for or were you provided any
9 materials from Restore with respect to any data
10 regarding life testing of the instruments?

11 A I don't remember specifically.

12 Q Do you have any general recollection?

13 A Generally, they communicated their safety,
14 but I don't recall specifically what documents or what
15 those interactions entailed.

16 Q And, generally, do you recall if there was
17 any life testing data that was submitted to you from
18 Restore with respect to the safety?

19 A Not that -- not that I can recall.

20 Q Are you aware whether Intuitive is required
21 to submit its life testing data with respect to its
22 usage limits to the FDA in connection with its
23 clearance?

24 A I'm -- I am now, yes.

25 Q And when did you first become aware of that?

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1 A I believe I became aware of that following
2 the cancellation of our first service agreement.

3 Q And that was the cancellation you testified
4 to in July of 2019?

5 A That's correct.

6 Q Okay. What's your awareness now of the life
7 testing data that Intuitive is required to submit to
8 the FDA?

9 A My awareness is that it -- that the
10 instrumentation is classified as a disposable item that
11 has a lifespan that's designated by Intuitive and is
12 licensed through the FDA with that lifespan.

13 Q And have -- has Intuitive been open with you
14 with respect to the -- to the fact that there is life
15 testing that occurs with respect to instruments and
16 that that is submitted to the FDA?

17 A Yes.

18 Q Outside of the representations you had from
19 Restore, do you have any independent basis to question
20 Intuitive's usage limits?

21 A No.

22 Q Now, I want to talk a little bit more about
23 that trial that occurred. You mentioned -- do you know
24 if that trial was conducted by Restore?

25 A They supplied -- they supplied the

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1 instruments, but we conducted the trial internally.

2 Q And who conducted the trial?

3 A I did.

4 Q How many times was the -- well, strike that.

5 Q What happened in the trial? Can you walk me
6 through it?

7 A Yes. We met with, I believe, probably
8 three -- three of our surgeons, one urologist and two
9 gynecologists, that were heavy da Vinci volume drivers
10 and discussed the potential for cost savings and asked
11 them if they would be willing to try out the
12 refurbished instrumentation, which they accommodated
13 and tried out and gave us feedback that they couldn't
14 tell any difference between that and the other
15 instruments that came directly from Intuitive.

16 Q Now, was this an instrument that had been
17 worked on by Restore or that third-party company you
18 referred to?

19 A Best of my understanding.

20 Q And how many -- was the instrument used in an
21 actual surgery on a patient?

22 A Yes.

23 Q So an instrument that had been worked on by a
24 third party that you had not -- well, back up.

25 Had -- did you -- did you have any

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1 conversations with anyone from Intuitive that you were
2 going to be using a refurbished instrument on a patient
3 in a surgery?

4 A I didn't personally, no.

5 Q And was it any concern of yours that you were
6 using an instrument that a third party had reprocessed
7 on a patient without vetting that with the original
8 equipment manufacturer?

9 A No.

10 MR. BERHOLD: Objection.

11 Q (By Mr. Bailey) Do you know how many times
12 the instrument had been sent for reprocessing to this
13 third party before it was used in the trial?

14 A I don't --

15 MR. BERHOLD: Objection.

16 THE WITNESS: I don't -- I don't have
17 that information.

18 Q (By Mr. Bailey) How many surgeries was the
19 instrument used as part of this trial?

20 A I don't recall specifically.

21 Q Do you have any general recollection?

22 A It was more than -- more than a few, more
23 than three or four, probably.

24 Q Was the same instrument used in each trial?

25 A Yes.